

Summary of MHA Nation Consultation September 1 2017

These notes summarize the consultation meeting held Friday September 1 2017 in Bismarck, ND between EPA Region 8 and the MHA Nation. Tribal participants were Chairman Mark Fox, Allen Nygard, John Fredericks, Lisa Lone Fight, and two staff who didn't introduce themselves. EPA Region 8 participants were Deb Thomas, Patrick Rogers, Cindy Beeler, Paul Logan, Lucita Chin, and Bert Garcia.

UIC

The Tribes consider ground water a critical resource to protect for future use, especially the Fox Hills aquifer. They want no water extraction from nor disposal into the Fox Hills. They are also concerned about the potential risk of contamination of the Fox Hills aquifer from injection wells that inject into the Dakota aquifer.

The Tribes wish to prohibit disposal into any aquifer within the Reservation unless it is first approved by the Tribes, pursuant to a tribal resolution. The Tribes asked EPA to implement the tribal ordinance by denying UIC permit applications for disposal wells that have not first obtained tribal approval. In the Tribes' view, the BIA has implemented the tribal ordinance, specifically in the Spotted Hawk matter.¹

John also raised the Slawson case, arising from a BLM-issued APD. In that case, the MHA Nation appealed BLM's issuance of an APD to Slawson and asked for a Stay during the appeal process. Their concern was that BLM did not incorporate the Tribes' 1000ft. setback requirement (Resolution No 12-087-VJB) from Lake Sakakawea. In the Stay Order, the IBLA discussed that the Constitution and By-Laws of the Three Affiliated Tribes were approved under the Indian Reorganization Act of 1934 (IRA). It further stated:

Its Federally-approved Constitution specifies that Tribal jurisdiction extends "to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation." When he approved the MHA Constitution, Secretary Ickes also ordered "[a]ll

¹ While this was John's characterization, note that the BIA decision specifically relied on a provision in the lease, not the tribal resolution itself. EPA pointed this out during the consultation. John thought this matter was settled, but we understand from the BIA that this matter was appealed to the IBIA and has not yet been decided. Further, EPA pointed out the different roles that the BIA and EPA play. BIA holds the land in trust for the Tribes, so its role here is to lease land for the purposes that the Tribes ask them to.

We have reviewed Section 8.1 of the Spotted Hawk Development, LLC, IMDA Oil and Gas Lease Document No. 301 7420A42433. The section states, in pertinent part, "[t]he Tribes shall provide and Lessee shall obtain a water permit for each well drilled or converted to a water source or injection well on the Leased Premises." Therefore, until such a permit is secured, we find it unnecessary to review any proposal for an UIC well. If you feel that the lessor's actions constitute a breach of the IMDA lease you may wish to invoke the remedies available under the "DISPUTES" clause of the lease found at Section 18.

officers and employees of the Interior to abide by the provisions of said Constitution and Bylaws."

The IBLA did not make any substantive rulings on this issue in the Stay Order. However, it stated that one of the key issues on appeal will be whether BLM was required to apply tribal law to its approval of the APDs.

The Tribes' theory is that their Constitution, approved under the IRA, specifically gives them jurisdiction over all lands, including lands held in fee. Therefore, pursuant to the trust responsibility, we have an obligation to uphold their laws and ensure that their jurisdiction is recognized on trust and fee land on the Reservation. Following that logic, the Tribes believed that the BIA, BLM and EPA must implement applicable tribal laws in our actions. In the Tribes' view, the tribal ordinance should result in EPA denying permit applications for UIC disposal wells which the Tribes haven't first approved, so that there's no consequent violation of tribal law.

EPA discussed our scope of authority when issuing permits. When approving, conditioning or denying permits, we can only consider factors that the SDWA and its regulations set out. Those factors outside of our regulations, like property rights or other state or local laws, are outside the scope of our authority and our process. We directed them to the language at 40 CFR 144.35 and let them know that issuance of our permit would not constitute compliance with any other applicable laws. John specifically rejected this, saying that the BLM in the Slawson case also had similar language to our 144.35 Effect of Permit language, and that the trust responsibility goes further than to not take a position when the tribe got into litigation.

We briefly discussed primacy / UIC TAS, acknowledging the likely long time frame to obtain it.

John asked that we not act on the seven permit applications for UIC disposal wells we've received until they can assess the BLM study on subsurface movement of injectate.

We encouraged MHA to provide comment on aspects of well construction (e.g. cement throughout depth of well?) during public comment period of proposed permits.

EPA specifically raised the question about whether the Tribes had any treaty rights concerns. The only specific treaty rights they raised related to an 1825 treaty and intercourse agreement. This has a provision about regulating trade under "mild and equitable" federal regulations. They relied primarily on the argument that the IRA may change EPA's obligations regarding our trust responsibility.

ORC will assess and formulate a response concerning whether EPA may utilize the Indian Reorganization Act, the federal trust responsibility, cooperative federalism, the 1825 trade and intercourse treaties with the tribes, and/or the tribal ordinance in deciding whether to approve or deny permit applications for UIC disposal wells.

Produced Water

The Chairman wants spills addressed to protect drinking water sources and other natural resources on the Reservation. He's concerned that on fee land operators believe the tribes have no

jurisdiction and the state enforces only in certain areas. They'd like to refer to EPA cases where operators don't respond to spills in accordance with tribal requirements, especially where the CWA doesn't apply.

ND executive branch staff is limited by a legislative requirement that any MOU/MOA with tribes with a fiscal impact must go through the legislature, so state staff are consequently unable to spend time working with tribes. The Tribes did not know whether that just affected the Governor or if it also affects Dave Glatt and NDOH.

Cindy indicated we're assessing our authorities and tools. The Chairman asked that we share that with them when it's complete, and that we involve Lisa Lone Fight in our discussions.

Even with spills outside of FBIR boundaries, the tribe wants to be prepared to assert their jurisdiction – they want help from federal agencies to assess damages and sue for damages caused on FBIR.

Regulated Facilities

The Chairman supports our proposal regulating the DW and discharging facilities but indicated he wants to take this to the Tribal Council. He and John had a number of practical questions – which facilities, how are they regulated, etc. They wanted more detail on the Parshall system in particular.

We noted that the Mann Oil well is also subject to EPA regulation yet has no EPA-issued permit, and deferred further discussion on that pending the outcome of the broader UIC questions.

We agreed to follow up by sending them a list of facilities we propose regulating and holding a conversation among program staff to address their questions. They'd like to involve other relevant federal agencies; for example, BOR for drinking water facilities, and BIA and BLM for UIC wells.

ACTION ITEMS

- Assess whether EPA may utilize the Indian Reorganization Act, the federal trust responsibility, cooperative federalism, the 1825 trade and intercourse treaties with the tribes, and/or the tribal ordinance in deciding whether to approve or deny permit applications for UIC disposal wells. ORC.
- Determine status of Spotted Hawk case. Tribes (John)
- Send John the list of EAB cases discussing scope of EPA authority. Lucita
- Assess EPA jurisdiction / authority / capabilities for spill response. Cindy
- Involve Lisa in spill technical calls. Cindy.
- Send the tribes a list of facilities we propose regulating. Add to this list any milestones or dates compelling us to move quickly. For example, expired permits, permit applications received by EPA, violations, etc. OWP.

- Set up a discussion with tribal staff to address questions on shifting regulation to EPA. OWP.
- Schedule a follow-up consultation discussion. OWP